

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06 A6 A7

Date: 7 September 2023

THE APPEALS CHAMBER

Before: Judge Gocha Lordkipanidze, Presiding Judge
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Pierre Perrin de Brichambaut
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public Document

**Response of the Common Legal Representative of the Former Child Soldiers
to the request for suspensive effect of the Addendum to the Reparations Order
introduced by the Defence (No. ICC-01/04-02/06-2864-Red)**

Source: Office of Public Counsel for Victims (CLR1)

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. In light of the Appeals Chamber's recent Order inviting responses to the requests for suspensive effect of the Addendum to the Reparations Order introduced respectively by the Defence and the Common Legal representative of the victims of the attacks (the "CLR2"),¹ the Common Legal Representative of the Former Child Soldiers (the "Legal Representative") hereby submits her observations.

2. Inasmuch as the CLR2's request for suspensive effect specifically targets access to priority services for four of his clients and therefore does not impact on the victims she represents, the Legal Representative's response will concentrate on the Defence's Request.

3. The Legal Representative submits that the impacts of possible suspensive effects on the implementation of the Reparations Order as a whole will unequivocally jeopardise her clients' right to finally access reparations. This is especially the case as victims have waited for over two decades to be granted support, and have already navigated over four years of reparations proceedings before this Court. She argues that the Defence has not demonstrated that unless the Impugned Decision is suspended, its implementation would create an irreversible situation, lead to consequences that would be very difficult to correct, or potentially defeat the purpose of its appeal. She thus requests the Appeals Chamber to reject the Defence's request for suspensive effect.

¹ See the "Order inviting the Trust Fund for Victims to submit observations on the requests for suspensive effect and setting a time limit for responses to the requests and observations" (Appeals Chamber), [No. ICC-01/04-02/06-2866 A6 A7](#), 23 August 2023 (the "Order").

II. PROCEDURAL BACKGROUND

4. On 8 July 2019, Trial Chamber VI convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes,² a conviction that was fully confirmed by the Appeals Chamber on 30 March 2021.³

5. On 7 November 2019, Trial Chamber VI issued the Sentencing Judgment, imposing individual sentences for each of the counts of which Mr Ntaganda had been convicted and a joint sentence of 30 years,⁴ a decision which was also entirely confirmed by the Appeals Chamber on 30 March 2021.⁵

6. On 8 March 2021, the Trial Chamber VI issued the “Reparations Order”.⁶ Said Order was subsequently appealed by the CLR27 and by the Defence,⁸ which filed a request for suspensive effect with its appeal. The Appeals Chamber rejected said request,⁹ and issued its “Judgment on the appeals against the decision of Trial Chamber

² See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019.

³ See the “Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2666-Red A2](#), 30 March 2021 with [AnxA](#) and [AnxB](#); as well as the “Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor’s appeal”, [No. ICC-01/04-02/06-2666-Anx1 A2](#); the “Separate opinion of Judge Howard Morrison on Mr Ntaganda’s appeal”, [No. ICC-01/04-02/06-2666-Anx2 A2](#); the “Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal”, [No. ICC-01/04-02/06-2666-Anx3 A2](#); the “Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor’s appeal”, [No. ICC-01/04-02/06-2666-Anx4 A2](#); and the “Corrected version of partly concurring opinion of Judge Chile Eboe-Osuji”, [No. ICC-01/04-02/06-2666-Anx5-Corr A2](#).

⁴ See the “Sentencing judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019.

⁵ See the “Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2667-Red A3](#), 30 March 2021.

⁶ See the “Reparations Order” (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

⁷ See the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparation Order”, [No. ICC-01/04-02/06-2674 A4](#), 7 June 2021. See also the “Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”, [No. ICC-01/04-02/06-2668 A4](#), 8 April 2021.

⁸ See the “Defence Appellant Brief against the 8 March Reparations Order”, [No. ICC-01/04-02/06-2675 OA4](#), 7 June 2021. See also the “Defence Notice of Appeal against the Reparations Order”, [ICC-01/04-02/06-2659](#)”, [No. ICC-01/04-02/06-2669 A5](#), 8 April 2021.

⁹ See the “Decision on the Defence request for suspensive effect” (Appeals Chamber), [No. ICC-01/04-02/06-2691 A4 A5](#), 2 July 2021.

VI of 8 March 2021 entitled ‘Reparations Order’” on 12 September 2022, partially reversing the Reparations Order and remanding the matter to Trial Chamber II (the “Chamber”).¹⁰

7. On 14 July 2023, the Chamber issued its “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” (the “Addendum”).¹¹

8. On 11 August 2023, the Chamber issued its “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations”, approving the Trust Fund for Victims’ (the “TFV”) updated draft implementation plan (the “DIP”) subject to the conditions and directions set out in the Decision.¹²

9. On 16 August 2023, the CLR2¹³ and the Defence¹⁴ filed their respective Notice of Appeal against the Addendum. The CLR2 included in its Notice of Appeal a request for suspensive effect in relation to the Chamber’s decision on the eligibility of four of his clients pending the Appeals Chamber’s determination of the Appeal.¹⁵ Whereas, on the same day, the Defence filed a separate Request for suspensive effect for the immediate suspension of the whole Addendum.¹⁶

¹⁰ See the “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Appeals Chamber), [No. ICC-01/04-02/06-2782 A4 A5](#), and its Annexes [A](#) and [B](#), 12 September 2022.

¹¹ See the “Public Redacted Version of Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” (Trial Chamber II), [No. ICC-01/04-02/06-2858-Red](#) and its Annexes [I](#) and [III](#), 14 July 2023 (the “Addendum”).

¹² See the “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations” (Trial Chamber II), [No. ICC-01/04-02/06-2860-Conf](#) and [No. ICC-01/04-02/06-2860-Red](#), 11 August 2023.

¹³ See the “Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the ‘Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659’, and Request for Suspensive Effect in relation to Trial Chamber II’s Decision on the eligibility of Victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13”, [No. ICC-01/04-02/06-2862](#), 16 August 2023.

¹⁴ See the “Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021”, [No. ICC-01/04-02/06-2863-Conf](#) and [No. ICC-01/04-02/06-2863-Red](#), 16 August 2023.

¹⁵ See the “Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the ‘Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659’, and Request for Suspensive Effect in relation to Trial Chamber II’s Decision on the eligibility of Victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13”, *supra* note 13, paras. 37-43.

¹⁶ See the “Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect”, [No. ICC-01/04-02/06-2864-Conf](#) and [No. ICC-01/04-02/06-2864-Red](#), 16 August 2023.

10. On 18 August 2023, the Appeals Chamber issued a Decision appointing Judge Gocha Lordkipanidze as the Presiding Judge in said appeals.¹⁷

11. On 23 August 2023, the Appeals Chamber issued an Order inviting the TFV to submit observations on the requests for suspensive effects, as well as inviting responses from both the Defence and the CLR2, by 7 September 2023 (the “Order”).¹⁸ The Order however failed to include the Legal Representative in its invitation.

12. The same day, prompted by the Legal Representative, the Presiding Judge informed her that, as a party to these appeals proceedings, she may as well, by the same deadline, file a response to the requests for suspensive effect submitted by the CLR2 and the Defence, and to the observations to be filed by the TFV.¹⁹

13. On 31 August 2023, the TFV submitted its Observations on the requests for suspensive effect.²⁰

14. On 1 September 2023, the Chamber issued its Decision on the TFV’s Ninth to Twelfth Update Reports on the Implementation of the Initial Draft Implementation Plan.²¹

¹⁷ See the “Decision on the Presiding Judge of the Appeals Chamber in the appeals of the common legal representative of the victims of the attacks and of Mr Bosco Ntaganda against the decision of Trial Chamber II entitled ‘Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659’” (Appeals Chamber), [No. ICC-01/04-02/06-2865 A6 A7](#), 18 August 2023.

¹⁸ See the Order, *supra* note 1.

¹⁹ See the email from the Legal Adviser of the Appeals Chamber on behalf of the Presiding Judge in the Ntaganda A6, A7 appeals to the Legal Representative on 23 August 2023 at 17:13, entitled “Ntaganda A6, A7”.

²⁰ See the “Observations on Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence”, [No. ICC-01/04-02/06-2867](#), 31 August 2023 (the “TFV Observations”).

²¹ See the “Decision on the TFV’s Ninth to Twelfth Update Reports on the Implementation of the Initial Draft Implementation Plan” (Trial Chamber II), [No. ICC-01/04-02/06-2868-Conf](#), 1 September 2023.

III. SUBMISSIONS

1. Applicable legal framework

15. Preliminarily, the Legal Representative observes that once again, while including part of its request for suspensive effect in its 20-page Notice of Appeal, the Defence filed a separate 11-page document developing said request, thereby circumventing the page limit allowed by the Regulations of the Court (the “Regulations”) for its Notice of Appeal.²² She refers in this regard to the previous Decision by the Appeals Chamber on the same issue, in which it found *“that a request for suspensive effect of a reparation order must be made in the notice of appeal”*.²³ For a proper use of Court resources, professional courtesy and to give due respect to the page limits imposed by the Regulations, the Legal Representative underlines that the Defence’s practice aimed at circumventing the allowed page limit, despite clear jurisprudence of this very Chamber, should be condemned. However, since the Defence nonetheless duly included the essence of its request for suspensive effect in its Notice of Appeal, the Legal Representative will respond to the latter below.

16. The Legal Representative notes that, according to article 82(3) of the Rome Statute, “[a]n appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence”. The Appeals Chamber has previously stated that “[s]uspension involves the non-enforcement of a decision, the subject of an appeal. Suspensive effect thereby maintains the position as it was prior to the issuing of the Impugned Decision”.²⁴

²² See regulation 37 of the Regulations: “A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber”. It is to be noted that regulation 57 of the Regulations governing notice of appeal in accordance with rule 150 of the Rules of Procedure and Evidence (the “Rules”) does not provide for another page limit and therefore regulation 37 shall apply. Likewise, regulation 57 of the Regulations and rule 150 of the Rules are not amongst the specific page limits foreseen by regulation 38 of the Regulations.

²³ See the “Decision on the Defence request for suspensive effect”, *supra* note 9, para. 14.

²⁴ See, *inter alia*, the “Decision on request for suspensive effect”, [No. ICC-02/05-01/20-134 OA](#), 25 August 2020, para. 5; the “Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect”,

17. The Appeals Chamber *“has consistently held that its decision to order that an appeal has suspensive effect is discretionary and that, when examining a request for suspensive effect, it ‘will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances’. [...] In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) ‘would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant’, (ii) would lead to consequences that ‘would be very difficult to correct and may be irreversible’, or (iii) ‘could potentially defeat the purpose of the appeal’”*.²⁵

18. In the context of the first appeal against the Reparations Order in this case, the Appeals Chamber underlined that it considered that these criteria *“are of a demanding nature and should be rigorously applied in view of the overriding importance of delivering reparations to victims following the Trial Chamber’s decision on conviction and in circumstances in which that decision is final.”*²⁶ In this regard, the Legal Representative observes that this principle finds an even more fundamental application today, now that more than two additional years have passed following the confirmation of the conviction.

2. Legal Representative’s submissions

19. The Legal Representative submits that none of the grounds raised by the Defence possibly impacting on the former child soldiers are of such a nature to: (i) create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the Defence; (ii) lead to consequences

[No. ICC-01/04-02/12-12 OA](#), 20 December 2012, para. 17; and the “Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review’”, [No. ICC-02/04/01/05-92 OA](#), 13 July 2006, para. 3.

²⁵ See the “Decision on the Defence request for suspensive effect”, *supra* note 9, paras. 20-21. See also the “Decision on suspensive effect” (Appeals Chamber), [No. ICC-01/13-43 OA](#), 6 August 2015, para. 7.

²⁶ See the “Decision on the Defence request for suspensive effect”, *supra* note 9, para. 21.

that would be very difficult to correct and may be irreversible; or (iii) potentially defeat the purpose of the Defence Appeal in absence of a suspension of the Reparations Order.

20. The Legal Representative underlines in the strongest possible terms that any decision related to the reparations proceedings at large inherently impacts all of her clients, such as the renewed broad request for suspensive effect formulated by the Defence. This is because any decision that might yet again postpone their access to reparative support is plainly prejudicial to their best interests. The Legal Representative insists on the fact that victims in the present case have been waiting for over twenty years now to finally be able to benefit from any type of support for the harms they suffered in 2002-2003 when they were less than 15 years old. They also have been involved in the proceedings before this Court for more than ten years, building on more and more hopes and legitimate expectations as the reparations procedures started four years and two appeals procedures ago.

21. In this regard, the Legal Representative refers to the Chamber's reminder that the "*obligation [for the Court] to repair the harm caused to the victims of the crimes for which the person was convicted is undisputed*".²⁷ In so doing, the Chamber also recalled in very clear terms the "*victims' right to prompt reparations considering that they have waited for more than two decades*".²⁸

22. The Legal Representative submits that the Defence Appeal again only concerns disagreements with the *modalities* of reparations contained in the Reparations Order and does not have any bearing on the content of the reparation *measures* the TFV has proposed in its DIP. Grounds 1 and 3 pertain to the procedural issue of whether or not the Chamber should have issued a totally new Reparations Order rather than an Addendum to it. Grounds 2 and 4 address whether the Chamber should have ordered the submission of a new DIP totally, rather than issuing a decision on the existing DIP validating some parts of it and requesting more information from the TFV on others.

²⁷ See the Addendum, *supra* note 11, para. 14.

²⁸ See *idem*, para. 19 (emphasis added).

Grounds 3 and 4 also cover the already over-litigated topic related to the eligibility assessment procedure to be conducted for new applicants. And Ground 5 attempts to litigate a renewed participation of the Defence in such a process. In this regard, it is to be noted that the Appeals Chamber has already clearly emphasised that the Defence need no longer be involved once the liability of the convicted person is properly determined – which it has; following the assessment of a sample of victims’ dossiers on which the Defence had a chance to provide its observations; and based on which the Chamber issued detailed guidance for future proceedings.²⁹ Finally, Grounds 6 and 7 debate the procedural way to assess the transgenerational harm suffered by most of the victims in the present case. Consequently, the Legal Representative posits that none of these grounds of appeal requires suspensive effect to be granted by the Chamber by virtue of their very procedural nature, not directly impacting the reparations programmes, nor the start of their implementation. To the contrary, in light of the relatively long processes at play between the identification of a potential beneficiary and her/his access to the programmes, it is of the utmost importance that purely procedural and theoretical debates do not impact on the expeditiousness of these proceedings, for a second time in four years.³⁰

23. The Legal Representative fully concurs with the TFFV’s observations pointing at all the preparatory steps needed before starting specific parts of a programme with its implementing partners. The steps indeed cover notably lengthy procurement processes, as well as preliminary work with partners which are completely disconnected from the appeals inasmuch as reparations programmes are going to be

²⁹ See the “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”, *supra* note 10, paras. 358-369.

³⁰ As articulated a few weeks ago by Trial Chamber V in another case before this Court and albeit at a different stage of the proceedings: “the Chamber highlights that expeditiousness is an independent and important value in the Statute to ensure the proper administration of justice and is therefore more than just a component of the fair trial rights of the accused”. See the “Public redacted version of Decision on the Common Legal Representatives of Victims Requests for Leave to Present Evidence and Further Order on the Remainder of the Prosecution Presentation of Evidence” (Trial Chamber V), [No. ICC-01/14-01/18-2016-Red](#), 6 September 2023, para. 50.

implemented in any case.³¹ The Legal Representative further agrees with the TFV that any suspension in the eligibility process at this stage, now that it has already started, *“impacts considerably the victims’ rights and certainty, and affects the do no harm principle”*.³² Both elements strongly militate against any suspension.

24. Regarding the eligibility process, the Legal Representative recalls that extensive litigation on this topic has been ongoing now for more than two years. Indeed, the Defence’s Appeal is the second time the latter expresses its disagreement with the procedure adopted by the Chamber, despite a first appeal having been adjudicated on the same topic already and the Chamber having modified part of the procedure following the Appeals Chamber’s guidance. Continuous litigation on topics already adjudicated several times over two cases (*Lubanga* and *Ntaganda*),³³ and already implemented in one of these two cases (*Lubanga*), not only contributes to the vulnerability experienced by the victims, their families, and their communities, but also jeopardises any hope of positive effect of the reparation measures. Such Defence strategy deprives the victims and the affected communities of any possible trust in the Court, the TFV, and its implementing partners.

25. Without prejudicing the Appeals Chamber’s adjudication of said Appeal, nor anticipating her observations on the content thereof, the Legal Representative posits in the strongest possible terms that litigation on the Reparations Order ought to stop. This incessant back-and-forth at this stage is unreasonable, and clearly runs against the protected interests of the victims in the present case, who are the main persons concerned by reparations proceedings, now that the Defence’s rights have been ascertained and sufficiently safeguarded.³⁴ In fact, the Legal Representative underlines

³¹ See the TFV Observations , *supra* note 20, para. 31.

³² See *idem*, paras. 24 and 26.

³³ The Legal representative notes the observations made by the TFV regarding the non-availability of its assistance programmes, but underlines that, nonetheless, the former child soldiers already processed as priority victims are included in the *Lubanga* programme. See the TFV Observations , *supra* note 20, para. 27.

³⁴ See the “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations”, *supra* note 12, para. 186: “As to the Defence’s involvement in the process of eligibility determinations and possible appeals, consistent with the Appeals Chamber’s views, the Chamber considers that no intervention of the Defence

that the Addendum to the Reparations Order has been issued “*bearing in mind the rights of the convicted person*” every step of the way,³⁵ and that all possible uncertainties have been “*resolved in favour of the convicted person*”.³⁶ As further observed by the Chamber in its Addendum, “*it should strike a balance and ensure that safeguarding the rights of a convicted person is not made at the cost of impairing the legitimate right of victims to obtain reparations without delay*”.³⁷

26. In this context, the Legal Representative underlines that procedures and processes are already part of the reparation measures, and if they have the potential of supporting the agency and the resilience of the victims concerned, they also have a strong potential of harming them further if not implemented adequately. The “*hostile environment*” to which the TFV is referring in its observations and the impact on the reputation of the Court as a whole,³⁸ does not only pose a risk to the success of the programme and its reparative value, but would also defeat the purpose of the reparations in their entirety.

27. Additionally, the Legal Representative respectfully recalls that all the former child soldiers, as well as the victims of sexual and gender-based violence, and the children born out of rape, have been recognised by the Chamber as particularly vulnerable.³⁹ In this context, the Chamber stressed that priority ought to be given to them, notably, and they were referred for access to urgent assistance. Such a postulate is in sharp contrast with the renewed situation of this second appeal and the renewed request formulated by the Defence to suspend the whole procedure once more.

28. Finally, the Legal Representative submits that it is of paramount importance that the Appeals Chamber takes into account the rights of the victims to fair trial guarantees,

is required as Mr Ntaganda’s interests at this stage of the proceedings are limited. In effect, the Chamber has already set the convicted person’s monetary liability and, as such, the results of the eligibility process will have no impact on his rights” (emphasis added).

³⁵ *Idem*, paras. 22, 193, 195, 323, 339, and 360.

³⁶ *Idem*, paras. 270, 293, 297, 318, 320, and 351.

³⁷ *Idem*, para. 22 (emphasis added).

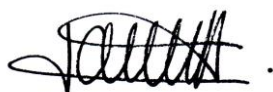
³⁸ See the TFV Observations, *supra* note 20, para. 26.

³⁹ See the “Reparations Order”, *supra* note 6, para. 214.

and specifically in the present instance, the right to the expeditiousness of the reparations proceedings. Indeed, the “fair trial” guarantees must apply throughout the proceedings and in respect of all parties and participants, including victims. This is all the truer at the reparations stage, where the victims of all the crimes for which Mr Ntaganda has been convicted, are one of the central parties in the proceedings.⁴⁰ Furthermore, as underlined *supra*, the liability of Mr Ntaganda has been settled, and, accordingly, his rights in the present procedure are adequately safeguarded, all the more because Mr Ntaganda has been found indigent, and the reparations will thus not be financed using his personal funds.

IV. CONCLUSION

29. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to reject the Defence request for suspensive effect.



Sarah Pellet

Common Legal Representative of the
Former Child Soldiers

Dated this 7th day of September 2023

At The Hague, The Netherlands

⁴⁰ In this regard, see the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985, which calls for enabling victims' access to Justice and to obtain redress as well as for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, [UN Doc. A/RES/40/34](#), 29 November 1985, Principles 4 to 7.